

NORTH CAROLINA **PRO BONO** RESOURCE CENTER

Powers of Attorney, Guardianship, Advanced Health Directives, and Emergency Conservatorships Overview

Thank you to Courtney C. Shytle, McGuireWoods LLP, for preparing this material.

What are each of these? When would I want to execute one and how do I do it? How do I finalize my documents if I cannot be there to sign the doc in person? And/or I have no witnesses to see me signing?

POWERS OF ATTORNEY

A Power of Attorney is a legal document whereby the Principal grants an Agent the ability to conduct certain transactions on behalf of the Principal such as bill paying or similar financial transactions or legal transactions. A "Durable" Power of Attorney refers to a Power of Attorney document that is intended to remain in effect if the Principal becomes incapacitated. A health care power of attorney is a distinct document with its own requirements and is discussed below.

A financial POA must be signed by the principal, and the signature must be acknowledged before a notary public or another person authorized by law to take acknowledgments. If the principal is physically unable to sign, another person may sign the principal's name, but the principal must direct the other person to sign, and that person must sign "in the principal's conscious presence." As long as the signer is personally present before the notary and acknowledges the signature, then the notary **can** proceed with performing the notarial act. If the **document** has **already** been **signed**, the signer **can** sign his or her name again above or next to the first signature.

On January 1, 2018, the North Carolina Uniform Power of Attorney Act became law. It brings clarity to many issues relating to powers of attorney. We recommend that if you executed a POA prior to 2018, you seriously consider executing a new one under the new law to update any existing Durable Power of Attorney document.

There *general* and *special* powers of attorney. A *general power of attorney* allows the person you name (or *your agent*) to do any and all things that you could legally do, from registering a car to selling a house. A *special (or limited) power of attorney* lists a particular act that the agent is authorized to do and limits the agent to that act. The agent can, of course, be authorized to do more than one legal act in a single special power of attorney.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you. Your agent is entitled to reasonable compensation unless you state otherwise.

You can use a special power of attorney to allow someone to do almost all legal actions that you can do yourself. Thus, for example, you could prepare a special power of attorney that lets your designated agent:

1. Buy or sell real estate;
2. Purchase a car or sell your furniture;
3. Sign your paycheck or withdraw money from your bank account;
4. Admit your child to the hospital for needed medical care;
5. Ship or store your luggage and household goods;
6. Sign your name to a lease or an agreement to connect utilities, such as electricity, gas, oil or telephone service;
7. Cash or deposit tax refund checks or transfer stocks and bonds.

ADVANCED HEALTH CARE DIRECTIVES

If you are 18 years old and are able to make and communicate health care decisions, you may create an advanced health care directive. There are four types of Advanced Health Care Directives.

1. A health care power of attorney allows you to name a person you trust to make your health care decisions if you cannot make them yourself. You should choose your health care agent very carefully because that person will have broad authority to make decisions about your health care. A good health care agent is someone who knows you well, is available to represent you when needed, and is willing to honor your wishes. It is very important to talk with your health care agent about your goals and wishes for your future health care so that he or she will know what care you want. Your agent may be anyone who is at least 18 years old and who is not your paid health care provider. A health care power of attorney may also include a “living will” provision as discussed below.
2. A declaration of a desire for a natural death (or living will) is document, which states that you desire not to have your life prolonged by extraordinary measures if you have a terminal or incurable illness or if you are in a vegetative state.
3. An advance instruction for mental health treatment makes a declaration of instructions, information and preferences regarding your mental health treatment. It also states that you are aware that the advance instruction authorizes a mental health treatment provider to act according to your wishes. It may also outline your consent or refusal of mental health treatment.
4. A declaration of an anatomical gift allows anyone over the age of 18 to make a gift by will, organ donor card or other document.

An advanced health care directive form must comply with North Carolina law. Below are links to forms developed to meet those requirements. We strongly urge you to download and complete one of these forms.

Importantly, to be valid, a health care power of attorney, living will, and advanced instruction for mental health treatment require your signature and they all must be witnessed by two people who are at least 18 years of age and a notary. If for some reason the testator is physically unable to sign the will, he or she may direct someone else present to sign on his or her behalf. **Do not sign any form until two witnesses and a notary are present to watch you sign it.** The principal and the witnesses must sign before a notary public. As long as the signer is personally present before the notary and acknowledges the signature, then the notary **can** proceed with performing the notarial act. If the **document has already been signed**, the signer **can** sign his or her name again above or next to the first signature. The two witnesses cannot be: (1) related to you by blood or marriage; (2) your heir or a person named to receive a portion of your estate in your will; (3) someone who has a claim against you or your estate; or (4) your doctor or other health care provider of a hospital in which you are a patient or an employee of a nursing home where you live.

A “donor card” requires the signatures of the donor and two witnesses; it does not require a notary.

You should consider filing your health care power of attorney with the Advanced Health Care Directive Registry maintained by the North Carolina Secretary of State. There is a \$10 cost per document registered. Registration is not required for the document to be valid. We encourage you to provide copies of all advanced health care directives to those that you designate to exercise decisions on your behalf and to those who are closest to you.

EMERGENCY CONSERVATORSHIP/GUARDIANSHIP

Guardianship is a legal relationship in which someone (the guardian) is authorized by the clerk of superior court to be substitute decision maker for an incompetent adult (the ward). Incompetence is determined in a court proceeding and means an adult is unable to manage his own affairs, or is unable to make important decisions.

Anyone may file a written request (a petition) with the clerk of superior court alleging that an adult (the respondent) should be declared incompetent. Every clerk's office has forms that may be completed and filed for the petition. The petition must include a sworn statement that the information in the petition is true. A fee for filing the petition may be required and may be reimbursed later by the court unless the court determines the petitioner did not have good reason to start the guardianship proceeding.

When a petition is filed, the clerk of court sets a date and time for the guardianship hearing. The sheriff serves copies of the petition and notice of the hearing on the respondent and on his attorney or other representative. The petitioner must mail copies of the petition and notice of the hearing to the respondent's spouse and relatives.

The petitioner may not need to be represented by an attorney at the hearing. However, it is advisable to at least talk with an attorney before starting a proceeding to have the court declare someone incompetent. If the petitioner is represented by an attorney at the hearing, the petitioner is responsible for paying the attorney's fees.

Before the hearing, the clerk may order medical, psychological, social work and other evaluations of the respondent. The petitioner or respondent may request such evaluations at the time the petition is filed, and both may receive a written report of the results.

The respondent may arrange for an attorney of his choice to represent him in the proceeding. If he doesn't have an attorney, the clerk of superior court appoints one, called a guardian ad litem, to represent him. The respondent is responsible for his attorney's fee. If the respondent is not financially able to pay the fee, the court will pay it.

At the hearing, the clerk serves as judge. The clerk or a jury will consider the results of the requested evaluations and other evidence that relates to whether the respondent is incompetent. The petitioner is responsible for presenting sufficient evidence to convince the clerk or jury that the respondent is incompetent. If the evidence does not convince the clerk or jury that the respondent is incompetent, the clerk dismisses the petition. If the clerk or jury decides that the respondent is incompetent, the clerk hears additional evidence about who should be appointed the guardian or guardians for the adult.

Once the adult has been determined to be incompetent and a guardian(s) is appointed, the guardian will receive a written order of appointment from the clerk. This order explains the guardian's powers and duties. If the guardian has questions about his powers and duties, he may direct them to the clerk or to an attorney.

The clerk may appoint a guardian of the person a guardian of the estate or a general guardian.

WILLS

Any person over the age of 18 who is of "sound mind" can make a will at any time. Most wills are type-written and signed by the testator—the person making the will—in the presence of at least two witnesses. If for some reason the testator is physically unable to sign the will, he or she may direct someone else present to sign on his or her behalf.

The witnesses do not have to read the will or know its contents. The law only requires that the testator declare in their presence that he or she intends to sign (or has signed) the document as a Last Will and Testament. The witnesses can generally be anyone, preferably someone who does not have an interest in the testator's estate. However, North Carolina law does not automatically invalidate a witness who may be a beneficiary of the will. A valid will does not require any type of seal or notarization. However, the law does allow the testator and witnesses to execute a notarized affidavit at the same time the will is signed, attesting to the fact the will was in fact signed by the testator in the witnesses' presence. This makes the will "self-proving," so that when it is filed after the testator's death, the probate court does not have to make a separate inquiry to determine if the signatures of the testator and witnesses were valid. The affidavit has the same legal force as if the parties testified in court under oath.

North Carolina also recognizes two alternate forms of wills, known as holographic and nuncupative wills. A holographic will is handwritten, not typed, and must be entirely in the testator's handwriting. Holographic wills are valid without witnesses, but the testator must still sign it. While witnesses are not required, it is still good practice to have witnesses and to sign in front of a notary. A nuncupative will is an oral will made in the presence of at least two witnesses. Most US states do not recognize nuncupative

wills, but North Carolina does if the testator is dying from his or her “last sickness or in imminent peril” and in fact dies as a result of that sickness or peril. North Carolina only permits nuncupative wills for the disposition of personal property. Real estate can only be disposed of by a written or holographic will.

NORTH CAROLINA LAW BY TOPIC

Powers of Attorney (Not Health Care POA)

NCGS Chapter 32C

Advanced Health Care Directives (Including Health Care POA)

NCGS §§ 35A-15 through 32A-27 and §§ 90-320 through 90-322

Emergency Conservatorship/Guardians

NCGS Chapter 35A

Wills

NCGS Chapter 31

For further information, go to:

Various forms discussed herein can be found at <https://www.nccourts.gov/>

Financial Power of Attorney Forms can be found at:

<https://www.ncbar.org/media/831356/poastatutoryshortform.pdf>

For more information regarding financial or tax powers of attorney, go to <https://www.ncdor.gov/taxes-forms/policies/power-attorney>

Advanced Medical Care Directive, Health Care Power of Attorney, Living Will, Organ Donor Forms and related information are available at:

https://www.sosnc.gov/divisions/advance_healthcare_directives

<https://www.unomedicalcenter.org/app/files/public/13173/pdf-medctr-advance-directive-english.pdf>

<https://www.ncmedsoc.org/wp-content/uploads/2014/02/Medical-Care-Decisions-and-Advance-Directives-full.pdf>

Information related to Guardianships can be found at:

<https://www.ncdhhs.gov/assistance/guardianship/guardianship-alternatives-to-guardianship>

Additional information regarding advanced health care directives and guardianships can be obtained at:

NC Department of Health and Human Services
2001 Mail Service Center
Raleigh, NC 27699-2000
Customer Service Center: 1-800-662-7030